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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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No. 79-1418

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GLOBE PAPER COMPANY,

Petitioner,

v.

EDGAR L. LINDLEY,
TAX COMMISSIONER OF OHIO,

Respondent.

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**On Petition for Writ of Certiorari to the Supreme Court of Ohio**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The unreported orders rendered by the Supreme Court of Ohio, dismissing Petitioner's appeal to that Court and overruling Petitioner's Motion for rehearing, are appended to the Petition for Writ of Certiorari at pages A1 and A2.

The unreported journal entry and opinion of the Court of Appeals for the Eighth Appellate District of Ohio is appended to the Petition for Writ of Certiorari at pages A3 through A14.

The journal entry of the Board of Tax Appeals of the

State of Ohio is appended to the Petition for Writ of Certiorari at pages A15 through A29.

The final order of the Tax Commissioner of Ohio is appended to the Petition for Writ of Certiorari at pages A30 through A33.

## JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. § 1257 (3).

## QUESTION PRESENTED

Whether the interpretation afforded Ohio Rev. Code § 5739.03 by the courts of Ohio is repugnant to Amend. XIV, § 1 of the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## OHIO STATUTES INVOLVED

Ohio Rev. Code § 5717.02:

> "Appeals from final determinations by the tax commissioner or the commissioner of tax equalization of any preliminary, amended, or final tax assessments,



> reassessments, valuations, determinations, findings, computations, or orders made by either commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by either commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.
>
> "Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if his action is the subject of the appeal, or with the commissioner of tax equalization if his action is the subject of the appeal, within thirty days after notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by either commissioner has been given or otherwise evidenced as required by law. The notice of such appeal may be filed in person or by certified mail. If the notice of such appeal is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the notice of appeal is presented shall be treated as the date of filing. The notice of appeal shall set forth, or have attached thereto and incorporated therein by reference, a true copy of the notice sent by such commissioner to the taxpayer of the final determination complained of, and shall also specify the errors therein complained of.
>
> "Upon the filing of such notice of appeal the tax commissioner or the commissioner of tax equalization shall certify to the board a transcript of the record of such proceedings before him, together with all evidence considered by him in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners

to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by such commissioner, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper."

Ohio Rev. Code § 5739.02 (B) (15):

"For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crises, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering sections 5739.01 to 5739.31 of the Revised Code, an excise tax is hereby levied on each retail sale made in this state.

* * *

"(B) The tax does not apply to the following:

* * *

"(15) Sales to persons engaged in any of the activities mentioned in division (E) (2) of section 5739.01 of the Revised Code, of packages, including material and parts therefor, and of machinery, equipment, and material for use in packaging tangible personal property produced for sale, or sold at retail. Packages include bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, and 'packaging' means placing therein;"



Ohio Rev. Code § 5739.03:

"Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:

"(A) If the price is, at or prior the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall collect the tax with and at the same time as the price;

"(B) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold to the consumer, charge the tax imposed by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code to the account of the consumer, which amount shall be collected by the vendor from the consumer in addition to the price. Such sale shall be reported on and the amount of the tax applicable thereto shall be remitted with the return for the period in which the sale is made, and the amount of the tax shall become a legal charge in favor of the vendor and against the consumer.

"If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B) (1) to (B) (11), inclusive, of section 5739.02, the consumer must furnish to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. If the transaction is claimed to be exempt under division (B) (13) of section 5739.02 of the Revised Code, the exemption

certificate shall be signed by both the contractor and his contractee and such contractee shall be deemed to be the consumer of all items purchased under such claim of exemption in the event it is subsequently determined that the exemption is not properly claimed. The certificate shall be in such form as the tax commissioner by regulation prescribes. If no certificate is furnished or obtained within the period for filing the return for the period in which such sale is consummated, it shall be presumed that the tax applies. The failure to have so furnished, or to have so obtained, a certificate shall not prevent a vendor or consumer from establishing that the sale is not subject to the tax within sixty days of the giving of notice by the commissioner of intention to levy an assessment, in which event the tax shall not apply.

"Certificates need not be obtained nor furnished where the identity of the consumer is such that the transaction is never subject to the tax imposed or where the item of tangible personal property sold is never subject to the tax imposed, regardless of use, or when the sale is in interstate commerce.

Ohio Rev. Code § 5739.13:

"If any vendor collects the tax imposed by or pursuant to section 5739.02, 5739.021 [5739.02.1], or 5739.023 [5739.02.3] of the Revised Code, and fails to remit the same to the state as prescribed or if any motor vehicle dealer collects the tax on the sale of a motor vehicle and fails to remit payment to a clerk of a court of common pleas as provided in section 4505.06 of the Revised Code, he shall be personally liable for any amount collected which he failed to remit. The tax commissioner may make an assessment against such vendor based upon any information in his possession.

"If any vendor fails to collect the tax or any consumer fails to pay the tax imposed by or pursuant to



section 5739.02, 5739.021 [5739.02.1], or 5739.023 [5739.02.3] of the Revised Code, on any transaction subject to the tax, such vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. The commissioner may make an assessment against either the vendor or consumer, as the facts may require, based upon any information in his possession.

"An assessment against a vendor in cases where the tax imposed by or pursuant to section 5739.02, 5739.-021 [5739.02.1], or 5739.023 [5739.02.3] of the Revised Code has not been collected or paid, shall not discharge the purchaser's or consumer's liability to reimburse the vendor for the tax applicable to such transaction.

"In each case the commissioner shall give to the person assessed written notice of such assessment. Such notice may be served upon the person assessed personally or by registered or certified mail. An assessment issued against either, pursuant to the provisions of this section, shall not be considered an election of remedies, nor a bar to an assessment against the other for the tax applicable to the same transaction, provided that no assessment shall be issued against any person for the tax due on a particular transaction if said tax has actually been paid by another.

"The commissioner may make an assessment against any vendor who fails to file a return required by section 5739.12 of the Revised Code or fails to remit the proper amount of tax in accordance with the provisions of section 5739.12 of the Revised Code. When information in the possession of the commissioner indicates that the amount required to be collected under the provisions of section 5739.02 of the Revised Code is, or should be, greater than the amout remitted by the vendor, the commissioner may upon the basis test checks of a vendor's business for a representative period, which are hereby authorized, determine the ratio which the tax required to be collected under

section 5739.02 of the Revised Code bears to the receipts from the vendor's taxable retail sales, which determination shall be the basis of an assessment as herein provided in this section. Notice of such assessment shall be made in the manner prescribed in this section.

"Unless the vendor or consumer, to whom said notice of assessment is directed, files within thirty days after service thereof, either personally or by registered or certified mail, a petition in writing, verified under oath by said vendor, consumer, or his authorized agent, having knowledge of the facts, setting forth with particularity the items of said assessment objected to, together with the reasons for such objections, said assessment shall become conclusive and the amount thereof shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. When a petition for reassessment is filed, the commissioner shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered or certified mail, but the commissioner may continue the hearings from time to time if necessary.

"A penalty of fifteen per cent shall be added to the amount of every assessment made under this section. The commissioner may adopt and promulgate rules and regulations providing for the remission of penalties added to assessments made under this section.

"Notice of the finding made at the hearing shall be served, either personally or by registered or certified mail, upon the party assessed.

"The vendor or consumer may appeal from an assessment, after notice of the findings of the commissioner, to the board of tax appeals in the same time and manner as that provided in section 5717.02 of the Revised Code.

"All assessments, exclusive of penalties, shall, if not paid within thirty days after service of the notice of



assessment, bear interest as provided in section 5739.-132 [5739.13.2] of the Revised Code.

"After the expiration of the period within which the person assessed may appeal to the board of tax appeals, or if no petition for reassessment is filed, and if the assessment remains unpaid, a certified copy of the entry of the commissioner making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the vendor's or consumer's place of business is located or the county in which the party assessed resides. If the party assessed maintains no place of business in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

"The clerk, immediately upon the filing of such entry, shall enter a judgment for the state against the vendor or consumer in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled 'special judgments for state, county, and transit authority retail sales tax.'

"From the date of the filing of the entry in the clerk's office, the assessment, which includes taxes and penalty, shall have the same effect as other judgments. Execution shall issue upon such judgment upon request of the commissioner and all laws applicable to sales on execution shall be applicable to sales made under such judgment except as provided in sections 5739.01 to 5739.31 of the Revised Code.

"All money collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by or pursuant to sections 5739.01 to 5739.31 of the Revised Code."

## STATEMENT OF THE CASE

Pursuant to Ohio Rev. Code § 5739.02, the State of Ohio levies an excise tax on retail sales consummated in Ohio. The tax itself is paid by the consumer of an item purchased to the vendor the item is purchased from.[1] If a vendor fails to collect the appropriate amount of tax on its retail sales it becomes liable for the uncollected amount.[2, 3]

Pursuant to Ohio law all sales are presumed to be retail sales and, therefore, subject to Ohio's tax on retail sales.[4] Ohio consumers may, however, claim that their purchases fall within the parameters of one or more exemptions from the tax imposed on retail sales.[5] In such a situation, if the consumer furnishes to his vendor a certificate [certificate of exemption] specifying the reason his purchase is not legally subject to tax the vendor need not collect tax on the transaction.[6] A certificate of exemption does not establish that the transaction is legally excepted from taxation; it merely relieves the vendor from its normal duty of collecting tax on the transaction.

[1] Ohio Rev. Code § 5739.03 provides:

> "Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, . . ."

[2] Ohio Rev. Code § 5739.13 provides:

> "If any vendor fails to collect the tax or any consumer fails to pay the tax imposed by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code, on any transaction subject to the tax, such vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. . . ."

[3] Ohio Rev. Code § 5739.12 requires that tax revenues collected by vendors be paid over to the Treasurer of Ohio on a monthly basis.

[4] Ohio Rev. Code § 5739.02 provides:

> "For the purpose of the proper administration of section 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established."

[5] Ohio Rev. Code § 5739.02(B) provides the bases for exemption to Ohio's tax on retail sales.



During May of 1974 Petitioner's Executive Vice President was notified by a representative of the Ohio Department of Taxation that Petitioner was under consideration for a routine sales tax audit. Upon subsequent examination of Petitioner's records it was discovered that Petitioner, a vendor, did not possess certificates of exemption for several sales made by it and for which it had not collected Ohio's sales tax. At that time the audit of Petitioner's records was suspended and, on June 16, 1974, a so-called 60-day letter was issued to Petitioner. This "60 day letter" was issued pursuant to Ohio Rev. Code § 5739.03 and was designed to apprise Petitioner that it had 60 days in which to gather evidence establishing the tax-exempt nature of those sales made by it but for which it neither collected sales tax or received a certificate of exemption. The "60 day letter" reads in pertinent part:

> ". . . [y]ou have sixty days in which to establish that any sales not already covered by valid exemption certificates are not subject to the tax. This cannot be

[6] Ohio Rev. Code § 5739.03 provides:

> "If any sale is claimed to be exempt . . . the consumer must furnish to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. . . . The certificate shall be in such form as the tax commissioner by regulation prescribes. If no certificate is furnished or obtained within the period for filing the return for the period in which such sale is consummated, it shall be presumed that the tax applies. . . ."

done by obtaining an exemption certificate at this time. A written statement from the purchaser furnishing information concerning exactly how each item involved is used will be given consideration. It is your responsibility to secure this information within the sixty day period. Information received after that time cannot be considered or allowed to establish proof of exemption.

"Upon expiration of the sixty day period we will proceed with our audit of your business records and those transactions not covered by the valid exemption certificates already approved by our agent or satisfactory statements from the purchasers establishing exemption, will be subject to the application of the tax."

On August 16, 1974 the 60-day grace period ended. Subsequent to that date representatives of the Ohio Department of Taxation requested from Petitioner all evidence acquired by it during the 60-day grace period that would establish the tax-exempt nature of the sales transactions in question. The Petitioner had no evidence to offer however. Accordingly, in the normal course of events, a sales tax assessment was issued to Petitioner charging it with the amount of tax due on all transactions for which it had not previously collected tax or obtained a certificate of exemption.[7]

Thereafter, Petitioner appealed the assessment issued to it to the Board of Tax Appeals of Ohio. During the course of this administrative appeal, nearly two years after the issuance of the "60 day letter," Petitioner for the first time offered letters designed to establish the tax-exempt nature of the sales transactions for which it was assessed. These letters were rejected by the Board of Tax Appeals as untimely and the assessment issued to the Petitioner was ultimately affirmed. On appeal to the Court of Appeals for the Eighth Appellate District of Ohio the Board of Tax Appeals decision was affirmed. Ohio's Supreme Court declined to review the decision rendered by the Ohio Court of Appeals.

[7] If Petitioner had offered evidence that established the tax-exempt nature of the sales in question no tax would have been assessed.



Petitioner now claims that the interpretation given Ohio Rev. Code § 5739.03 by the courts of Ohio is repugnant to Amend. XIV, § 1 of the United States Constitution for the reason that no evidentiary hearing is required within the 60-day grace period to enable a vendor to establish the tax-exempt nature of sales made by it which are not supported by certificates of exemption.

## ARGUMENT OF LAW

Petitioner alleges that the interpretation afforded Ohio Rev. Code § 5739.03 by the courts of Ohio denies it due process of law and is repugnant to Amend XVI, § 1 of the United States Constitution. Specifically, Petitioner alleges that it was deprived of its Constitutional rights because it was not afforded an evidentiary hearing in which to present evidence, designed to establish the tax exempt nature of those sales made by it but for which it neither collected Ohio's sales tax or obtained a certificate of exemption, within the 60 day grace period provided by Ohio Rev. Code § 5739.03.

Respondent submits to the Court that the absence of a hearing within the 60 day grace period of Ohio Rev. Code § 5739.03 did not deprive Petitioner of any of its constitutional rights.

Petitioner, an Ohio vendor, had a statutory duty to either collect tax on all sales transacted by it or, in the alternative,

obtain certificates of exemption specifying why the sales were not subject to tax. Ohio Rev. Code § 5739.03. With reference to the transactions assessed by the Ohio Department of Taxation, the Petitioner did neither. For this reason alone Petitioner could have lawfully been assessed. In Maryland a form of absolute liability has been imposed on vendors who have failed to perform similar statutory duties. *Comptroller of Treasury* v. *Atlas General Industries,* 234 Md. 77, 198 A. 2d 86 (1964). Ohio, however, grants vendors in the situation Petitioner finds itself 60 extra days to gather evidence which establishes the tax exempt nature of those sales which were transacted by them but for which they neither collected tax or obtained a certificate of exemption. After the 60 day grace period expires the vendor's evidence is reviewed by the Ohio Department of Taxation and if it adequately supports the tax exempt nature of the sales in question the vendor is relieved from the tax liability that would otherwise be imposed on it pursuant to Ohio Rev. Code § 5739.13. If the evidence is not adequate an assessment will be issued to it. Before such an assessment becomes conclusive, however, it is subject to review by the Ohio Department of Taxation and appeal to Ohio's Board of Tax Appeals and ultimately Ohio's Supreme Court.[8]

The Court has indicated on past occasions that due process for tax purposes requires only the availability of a review proceeding before a tax assessment becomes final. See *Fuentes* v. *Shevin,* 407 U.S. 67, 90-92 (1972); *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589 (1931). As previously indicated, in the present case the assessment issued to Petitioner was subject to several reviews before it became final. Moreover, before the assessment was issued

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[8] Ohio Rev. Code §§ 5739.13, 5717.02 and 5717.04.



Petitioner had an opportunity to fill in the gaps in its records upon which its tax liability was ultimately based. In light of these facts it can not successfully be argued that the Petitioner has been denied the protections of Amend. XIV, § 1 of the United States Constitution by the Ohio Courts' interpretation and application of Ohio Rev. Code § 5739.03.

## CONCLUSION

The absence of a hearing within the 60 day grace period provided for by Ohio Rev. Code § 5739.03 does not violate the guarantees of Amend. XIV, § 1, of the United States Constitution.

Respectfully submitted,

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